POSSESSION AND CUSTODY IN THE LAW OF LARCENY

An investigation of the modern law of larceny gives an impression of utter confusion, a field for the courts to exercise their abilities in making fine, technical, and narrow distinctions. Frequently it appears to be largely a matter of guess-work as to whether or not the offense committed is larceny, embezzlement, obtaining property by false pretenses, or some other form of statutory offense created by the legislature in a vain attempt to fill up some loop-hole in the existing laws. Without a study of the early common law and its development this confusion is inexplicable.

A recent case in one of the English police courts, (1920, Westminster Pol. Ct.) 84 JUSTICE OF THE PEACE, 508, illustrates the difficulties involved in the subject. An employee of the London General Omnibus Company was discharged; at the time of her dismissal the company had demanded the return of a staff pass issued to her, which she claimed to have lost. Later she was found travelling with the pass, and was accused of stealing it, as bailee.

From early times a fundamental characteristic of the offense of larceny has been the trespassory taking from the owner.[1] The act had to be done *animo furandi* and *invito domino*.[2] It can therefore readily be seen that the common-law definition, if accurately construed, would not include cases dealing with the misappropriation of property by bailees or servants, nor would it include cases of wrongful acquisition of property by fraud or artifice. The present confusion in the law is due to the attempts of the courts and the legislative bodies to provide for the punishment of such offenses as seem not to be covered by the common law.

One of the first qualifications found necessary was some provision for holding bailees who fraudulently misappropriated property entrusted to them. Accordingly, in 1473, the Court of Star Chamber decided that, if a bailee, in violation of the terms of his bailment, "breaks bulk," the bailment is terminated and the subsequent conversion of a part of the property is the felonious taking constituting the crime of larceny.[3] This decision created an anomalous situation, in that, when the entire object was converted, there was no larceny, but when part only was converted, there was larceny. This distinction is obviously unsound, and probably the original decision was the result of a compromise to

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[1] Joseph H. Beale, *The Borderland of Larceny* (1892) 6 HARV. L. REV. 244.

For various early definitions of larceny see 3 Stephen, *History of the Criminal Law* (1883) 129.

"Larceny is the treacherously taking away from another moveables corporeal, against the will of him to whom they do belong, by evil getting of the possession, or the use of them." *Mirrours of Justices*, 31.

[2] See (1894) 28 IR. L. T. 290; reprinted in (1894) 27 CHI. LEG. NEWS, 101.

[3] *The Carrier's Case* (1473) Y. B. 13 Edw. IV, p. 9, pl. 5; reported also in Pollock & Wright, *Possession in the Common Law* (1888) 134.

propitiate the Lord Chancellor;[4] nevertheless it is still recognized as law.[5] Many states, however, have enacted statutes which make the misappropriation of property by a bailee larceny whether or not there has been a breaking of bulk.[6]

In 1779 the doctrine of larceny by trick was introduced by *Pear's Case,*[7] which held that if a person obtains the delivery of a thing by fraud, artifice, or trick, intending at the time to convert it, such a taking is larceny. This decision, which really only followed the precedent set by the *Carrier's Case,*[8] introduced a highly burdensome qualification which has clogged the courts with subtle questions only determinable by juggling the terms "possession" and "custody" to meet the needs of the particular case. To convict the accused of larceny, the court held that, since the original intent was fraudulent, the contract was a mere pretense and that the possession remained unaltered in the true owner at the time of the conversion. The courts still continue to follow the reasoning of this decision[9] and have even developed it in some cases to include installment contracts, in which they hold that the title does not pass until the whole contract is performed on both sides.[10]

In 1779 *Bazeley's Case*[11] caused the enactment of the English embezzlement statute[12] intended to cover cases dealing with the misappro-

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[4] Stephen, *op. cit.* note 1, at p. 139.

[5] *Reg. v. Poyser* (1851) 5 Cox. C. C. 241; *State v. Ruffin* (1913) 164 N. C. 416, 79 S. E. 317; COMMENTS (1916) 4 CALIF. L. REV. 341. See also 2 Wharton, *Criminal Law* (11th ed. 1912) sec. 1208.

[6] Crim. Code Ill. 1874, sec. 170, applied in *Bergman v. People* (1898) 177 Ill. 244, 52 N. E. 363; Penal Code N. Y. 1881, sec. 528, applied in *In re McFarland* (1891, Sup. Ct.) 59 Hun, 304, 13 N. Y. Supp. 22.

See *Burns v. State* (1911) 145 Wis. 373, 128 N. W. 987, applying Wis. St. 1898, sec. 4415: Whoever being bailee of any chattel . . . shall fraudulently take . . . the same . . . , although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny." See also 20 & 21 Vict. c. 54, sec. 4 (1857); *In re Wakeman* (1912) 8 Cr. App. 18; (1874) 38 JUSTICE OF THE PEACE, 194, which shows how strictly the courts have construed the English statute.

[7] *Rex v. Pear* (1779) 1 Leach C. L. 253, 2 East P. C. 685 (prisoner hired a horse, ostensibly to take a journey, promising to return the horse that same evening; subsequent conversion of the horse held to be larceny).

[8] *Carrier's Case, supra* note 3. See Beale, *op. cit,* 6 HARV. L. REV. 250: "The decision is an application of the rule established, or supposed at that time to have been established, by the Carrier's Case, the only other authority cited by the court."

[9] *People v. Miller* (1902) 169 N. Y. 339, 62 N. E. 418; *State v. Fitzsimmons* (1918) 30 Del. 152, 104 Atl. 338; *People v. Rae* (1885) 66 Calif. 423, 6 Pac. 1; *Williams v. State* (1905) 165 Ind. 472, 75 N. E. 875.

See also *People v. Mills Sing* (1919, Calif. App.) 183 Pac. 865, for a rather extreme application of the principle.

[10] *Regina v. Russett* [1892] 2 Q. B. 312.

[11] *Rex v. Bazeley* (1799) 2 Leach C. L. 973. A bank clerk received a £100 note to put to the credit of a customer and converted it to his own use. The court held this to be a mere breach of trust and not a felony, for the bank never had possession.

priation of property by servants and clerks. It was impossible to distort the common-law doctrine of larceny to cover these cases where the property misappropriated had never even come into the master's possession, but had been converted by the servant by virtue of his employment. This statute has been adopted in substantially the same form in the United States[13] and re-enacted in England,[14] although the offense now is usually extended to include all cases of taking by bailees and other persons in a confidential relationship to the principal who have a rightful possession.[15]

Under the old common-law doctrine many cases arose where the owner delivered property to his servant to be dealt with in the course of his employment. In the *Carrier's Case*[16] the court in a dictum seemed inclined to hold that in such cases a subsequent conversion by the servant would be larceny. This was reconsidered in 1488,[17] but shortly thereafter a statute was enacted making this sort of misappropriation a felony.[18] Since that time the courts have consistently so ruled on the theory that the servant has custody only, the possession being in the master up to and at the time of the conversion.[19] When the crime of embezzlement was first created these cases were clearly distinguishable,

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[12] 39 Geo. III, c. 85 (1799). This statute enacted that if any clerk or servant should, by virtue of his employment, receive or take into his possession any chattel, money, or valuable security for, or in the name of, or on account of his master, and should fraudulently embezzle the same, he should be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of the master otherwise than by the actual possession of the offender.

See also NOTES (1916) 5 CALIF. L. REV. 73, distinguishing Larceny and Embezzlement and stating the so-called doctrine of "ultimate destination."

[13] Calif. Penal Code 1903, sec. 508; Mass. Gen. St. 1860, ch. 161, sec. 38.

[14] 24 & 25 Vict. c. 96, sec. 68 (1861); see also Larceny Act, 1916, sec. 17 (1).

[15] See (1920) 20 COL. L. REV. 318, 320; See also *Sykes v. State* (1919, Fla.) 82 So. 778; *Bivens v. State* (1912) 6 Okla. Cr. App. 52, 120 Pac. 1033; *Campos v. State* (1918, Tex. Cr. App.) 207 S. W. 931; *Moore v. United States* (1895) 160 U. S. 268, 16 Sup. Ct. 294.

[16] *Carrier's Case, supra* note 3. [17] (1488) Y. B. 3 Hen. VII, p. 12, pl. 9.

[18] 21 Hen. VIII c. 7 (1529), providing that a servant who converts goods delivered to him by his master shall be guilty of a felony and punishable as other felons by the course of the common law.

[19] 2 East P. C. 564; *Aabel v. State* (1910) 86 Neb. 711, 717, 126 N. W. 316, 319; *People v. Kawananakoa* (1918) 37 Calif. App. 433, 174 Pac. 686; *Bonatz v. State* (1919) 85 Tex. Cr. App. 292, 212 S. W. 494; *Chanock v. United States* (1920, App. D. C.) 267 Fed. 612.

See Pollock and Wright, *op. cit.* note 3, at p. 138: "Here it was once thought the possession passed to the servant, at any rate when the charge was to be executed away from the master, and particularly when the thing was not to be kept, but to be delivered absolutely to a third person; but it has long been settled that in all such cases the master's possession continues. The servant is said to have not the possession but a mere charge (*onus*) or custody." See authorities cited in text.

See also L. R. A. 1918 A, 318, note.

but under some of our modern statutes a misappropriation may be either larceny at common law or embezzlement under the statute, or *vice versa*.[20]

There is one more important group of cases, that which deals with the obtaining of property by false pretenses. This offense very closely resembles larceny by trick. The distinction between the two is based entirely on the question of possession, the courts holding the misappropriation to be larceny where the owner intended to part with the temporary possession only, and obtaining by false pretenses where the owner intended to part with his entire title to the property by reason of the defendant's misrepresentations.[21] This is another offense which the courts could not include in the common-law definition of larceny without entirely doing away with the basic requirement of a trespassory taking. An English statute was enacted in 1757 making this offense a misdemeanor.[22] The distinction above given between larceny and obtaining by false pretenses is the one generally accepted as the better view,[23] but the courts have confused the issue by extending the offense of obtaining by false pretenses to include cases where the title never passed to the accused at all, the intention of the owner being to use him as a mere conduit or means of conveying the property to a third party.[24] Such a misappropriation is really larceny.[25]

It has been pointed out rather forcefully that the existence of the subtle distinctions in these crimes is largely "due to accidental, historical

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[20] *State v. Taberner* (1883) 14 R. I. 272, holding that the offense could be larceny either under the statute or at common law. The statute provided that embezzling by a clerk or servant of property entrusted to him constituted larceny.

But other courts hold that one cannot be convicted under such a statute, on an indictment for larceny at common law, and that, in order to convict the accused under these statutes, the indictment must show acts of embezzlement and aver that the accused so committed his act of larceny. *Kibs v. People* (1876) 81 Ill. 599; *State v. Harmon* (1891) 106 Mo. 635, 18 S. W. 128; *Commonwealth v. Doherty* (1879) 127 Mass. 20.

[21] See 2 East P. C. 668: "The next inquiry is whether the owner, in making the delivery, intended to part with the *property*, or only with the *possession* of the thing delivered. For if he parted with the *property* to the prisoner, by whatever fraudulent means he was induced to give the credit, it cannot be felony."

See also, 1 Bishop, *Criminal Law* (8th ed. 1892) secs. 583-586; 3 Stephen, *op. cit.*, note 1, 160.

[22] 30 Geo. II c. 24, sec. 1 (1757). See also 33 Hen. VIII c. 1 (1541) making the obtaining of goods by false tokens a misdemeanor.

[23] *Rex v. Pear, supra* note 7; *Williams v. State* (1905) 165 Ind. 472, 75 N. E. 875, 2 L. R. A. (N. S.) 249, note; *People v. Miller, supra* note 9; *People v. Mills Sing, supra* note 9.

But see *Rex. v. Sanders* [1919, Cr. App.] 1 K. B. 550, for an extreme case, held to be false pretenses.

[24] *Zink v. People* (1879) 77 N. Y. 114; *Rex. v. Coleman* (1785) 2 East P. C. 672.

[25] See Beale, *op. cit.* 6 HARV. REV. 254, showing the existing confusion in the application of the distinction.

"causes" and that their continuance is entirely unnecessary.[26] These criticisms are merited and the legislatures are gradually coming to realize the necessity of action. New York has endeavored to meet the situation by consolidating the offenses into one crime of larceny;[27] England has adopted similar measures which have worked out even more effectively;[28] but the best results have been obtained in Massachusetts, where the existing statutes appear to have solved all difficulties.[29] Here the crimes of larceny, embezzlement, and obtaining property by false pretenses are consolidated as in New York and a further provision is made so that an indictment for larceny "may be supported by proof "that the defendant committed larceny of property, or embezzled it, "or obtained it by false pretenses." This legislation, as indicated by the decisions of the court, appears to meet the requirements.[30] It is to be hoped that the legislative bodies in other states will soon follow the lead of Massachusetts and do away with the present cumbersome and antiquated laws which have now for so long needlessly perplexed the courts and retarded justice.[31]

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[26] NOTES (1914) 2 CALIF. L. REV. 334. See also 3 Stephen, *op. cit.* note 1, at p. 158, for full explanation of the development of the law of larceny. ". . . These provisions contain the present law as to criminal breaches of trust. They constitute a series of exceptions to the old common law so wholly inconsistent with its principle as to make it at once unintelligible and, so far as it still exists, a mere incumbrance and source of intricacy and confusion."

[27] 4 N. Y. Cons. Laws 1909, 2696. *People v. Brenneauer* (1917, Sup. Ct.) 101 Misc. 156, 166 N. Y. Supp. 801: "Since the adoption of the Penal Code it has been repeatedly held that an indictment charging larceny in the common-law form is not supported by proof showing the crime of larceny by false pretenses or by what formerly constituted the crime of larceny by false pretenses or by what formerly constituted the crime of embezzlement."

[28] The Larceny Act, 1916. See also 24 & 25 Vict. c. 96 (1861) and authorities in note 6, *supra.*

There appear to be no recent English cases which disclose how effectively the 1916 statute will operate. Sections 1, 17, 32, and 40 are especially interesting for the purposes of this comment.

The principal case would seem to be correctly decided under section 1.

[29] Rev. Laws Mass. 1902, ch. 208, sec. 26; ch. 218, sec. 40. See also ch. 218, sec. 39, providing that defendant may order the prosecution to file a bill of particulars so as to inform him more fully of the nature and grounds of the crime charged. This provision meets the objection that these consolidation statutes fail to protect the right of the defendant to be fully informed of the accusation.

[30] *Commonwealth v. Kelley* (1903) 184 Mass. 320, 68 N. E. 346; *Commonwealth v. McDonald* (1905) 187 Mass. 581, 584, 73 N. E. 852, 853: "But since this enactment it has been unnecessary to state the fiduciary relation existing between a defendant and the person entitled to the property embezzled, or to allege that the defendant to whom it has been entrusted converted it to his own use, for the crime of larceny under this statute includes the criminal appropriation of property where no trespass, or fraud which has been held equivalent to trespass, in obtaining its possession appears."

[31] For an excellent summary of this problem with references to modern statutes see NOTES (1920) 20 COL. L. REV. 318.